

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION

IN THE MATTER OF)	DECISION AND ORDER
EDDIE ALDEN, JR.,)	OSPI 24-82

This is an appeal from the Findings of Fact, Conclusions of Law and Order of the Big Horn County Superintendent of Schools with regard to a special education controversy involving Eddie Alden, Jr. (hereinafter referred to as Appellant). Counsel for both parties have stipulated to waive the time limitation for rendering such Decision and Order within 30 days as provided by Section 121a.512, Code of Federal Regulations.

Appellant was born June 17, 1963. He turned 19 years of age on July 17, 1982. Appellant has a lesion on the left hemisphere of his brain which causes him to suffer a receptive aphasia that prevents him from comprehending what he hears. In other words, he requires cross sensory modality learning. Appellant also has a lesion on the right hemisphere of his brain that prevents him from forming or maintaining interpersonal relationships and causes him to engage in excessive physical aggression. towards himself and others.

Appellant is a handicapped child within the meaning of the term under Section 20-7-411 Montana Codes Annotated (hereinafter referred to as M.C.A.).

From the transcript of record, the evidence reveals that Appellant has been placed in several educational institutions in prior years. The Yellowstone Boys Ranch was the first brief residential placement. Later, he was placed at the Intermountain Youth Center in Tucson, Arizona and then at the Jane Waylon School in Phoenix, Arizona. All of these placements lasted for a relatively short period of time

With the consent of Respondent school district, Appellant was later transferred to the Brown School's Ranch Treatment Center in Austin, Texas. He has been a resident there for approximately three years. School District #1 of Big Horn County (hereinafter referred to as Respondent) had been paying \$660.00 per month as its educational

costs for Appellant. The Respondent had shared the cost of education and room and board for Appellant at the Brown's School through an agreement with the Indian Health Services and the Bureau of Indian Affairs and social security supplement. The record discloses that because of financial cutbacks on the federal level, the Indian Health Services and the Bureau of Indian Affairs failed to provide the contract amount for residential placement costs. The Respondent was then requested by the legal guardian of Appellant to pay for his entire placement costs. This request was made pursuant to the Education of the Handicapped Act. 20 U.S.C. Section 1400 eq.

Appellant raises three issues on appeal. This State Superintendent has consolidated the issues as follows:

1. Whether the County Superintendent erred in her conclusions of law that the school district is not liable to pay residential placement, costs.
2. Whether the County Superintendent erred and abused her discretion in concluding that Appellant was not entitled to a free appropriate education after his 19th birthday.

Section 20-7-411 MCA states in part:

Regular classes preferred-obligation to establish special education program. (1) All handicapped children in Montana are entitled to a free appropriate public education provided in the least restrictive alternative setting. To the maximum extent appropriate, handicapped children, including children in public and private institutions or other care facilities, shall be educated with children who are not handicapped. Separate schooling or other removal of handicapped children from the regular educational environment may occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Federal law also requires payment of room and board expenses when it is necessary for an appropriate educational placement.

If placement in a public or private residential program is necessary to provide special education and related services, the program, including non-medical care and room and board must be at no cost to the parents of the child. 45 C.F.R. Section 121.302, 20 USC 1412(2)B.

Montana Rules state:

Room and board expenses must be approved by the Superintendent of Public Instruction. See Section 10.16.2003 ARM.

Counsel for the Respondent presented a case whereby an appropriate placement may be made in the Hardin School District. It appears from the testimony that there may be sufficient services in the Hardin School District to provide Appellant with a free appropriate public education. However, that was not the issue nor the procedure by which such determination could be made. The issue is whether Appellant's placement in the Brown's School was proper and who has financial responsibility.

The record of the hearing below is devoid of any evidence that a placement in the Brown's School was not proper. Indeed, Respondent participated in and consented to the placement.

Appellant has been placed at the Brown's School. Such placement at that time was deemed appropriate by the Child Study Team. From the time of the initial placement, no Child Study Team has recommended a different placement. Once Appellant was placed in this residential program, the Respondent and the other governmental agencies who contracted with the Respondent were responsible for its costs. If Respondent determines that Appellant may be placed in an appropriate special education program, in the least restrictive environment, within the exterior boundaries of the State of Montana, it must follow proper administrative procedure. Such determination must be made by the Child Study Team. To require the Respondent to fund for residential placement, Appellant had to show that the Brown's School was an appropriate placement. The extensive record reveals that such was an appropriate placement. The Respondent also provided evidence showing that appropriate placement may have been made in Hardin, Montana. But to determine whether Appellant should be placed in Montana, a change of placement, requires a Child Study Team recommendation. Section 10.16.903 of the Administrative Rules of Montana (hereinafter referred to as ARM) provides the initial means by which Child Study Team evaluations may determine that a change of educational placement is appropriate and the means by which such change shall occur. Section 10.16.904 ARM provides that a child must continue in the current placement until any potential legal proceeding has been completed.

Section 10.16.1210 ARM provides annual review of the program's appropriateness for the child.

On page 98 of the transcript a question was asked by counsel for the Appellant to a Mr. Steve Smith, Director of Special Education for Hardin School District and the Big Horn Special Education Cooperative;

Question. At the last child study team, wasn't **it** the conclusion that Eddie should remain at the Brown's School until something more appropriate could be found, or an appropriate Montana placement could be found?

Answer. I think the idea was that Eddie continue in that placement until we had an opportunity to look at alternative sites for his placement here in Montana, then we would continue with the existing funding pattern. T. p. 200.

Question. Have you found any appropriate Montana placements at this time?

Answer. There might be one pending. Does that count?

Question. Well, is **it** open right now?

Answer. No, **it's** not

Respondent argues that the Respondent had failed to secure the approval for out-of-district placement for the payment of room and board expenses from the State Superintendent of Public Instruction. Because of such failure, Respondent contends Appellant's out-of-state placement was inappropriate. The lack of contact with the Office of Public Instruction by the Respondent cannot relieve the Respondent of its obligation for appropriate placement, hut **it** has relieved the state from the obligation to pay for such placement until the Respondent makes proper application to the state educational agency.

The second issue raised in this appeal is whether the County Superintendent erred and abused her discretion in concluding that Appellant was not entitled to a free appropriate education after his 19th birthday. The County Superintendent in her Conclusions of Law stated:

2. 20-7-411 (2) M.C.A. mandates that the district provide Eddie Alden with a free appropriate education until he reaches his 19th birthday, July 17, 1982.

4. There is no evidence in the record from which a finding may be made that the Superintendent of Public Instruction and the trustees of the district ever established a program for handicapped persons between the ages of 0 and 21 years. Therefore, the district is not obligated under 20-7-412 (2)(c) M.C.A. or any state and federal regulations, to provide a special education program for persons between the ages of 0 and 21.

U.S.C. Section 1412 (B) states: "Free and appropriate public education shall be provided to all handicapped children between the ages of 3 and 21." The Federal law states that education of those between 18 and 21 is not required providing the education is not inconsistent with state law. Montana's compulsory enrollment statutes and mandatory special education provision mandate special education for children between ages of 6 to 18 Section 20-4-411(2) MCA. The law does provide the board of trustees the discretionary power to allow special education through age 21. Section 20-7-412(2) MCA.

A state is not required to make a free appropriate education available to a handicapped child in one of these age groups if:

(i) state law expressly prohibits or does not authorize the expenditure of public funds to non-handicapped children in that age group; or

(ii) the requirement is inconsistent with a court order which governs the provision of a free public education to handicapped children in that state. 45 C F R. Section 121a300(b)(5).

Montana allows public funds to be spent on non-handicapped children over age 19. Section 20-5-101(3)(b) MCA.

Federal and state law require that a school district provide free appropriate education to students over age 18 with a particular handicap if it provides services to other students over 18 with that handicap. 45 CFR Section 121a.300. See also Amendment XIV, U.S. Constitution, Section 4, Article II, Montana Constitution 1972. The record shows that the Respondent did provide an education to students with similar handicaps, emotionally disturbed, mentally retarded, speech and language impaired and provides services to students as old as 20 years. See T. p. 184.

Mr. Steve Smith in an answer to a question on the Respondent service of other students said:

OK. Presently we serve--our last child count that we did, which was in December 15, we were serving approximately 272 children, age anywhere from 6 months to 19 years of age, 20 years of age.

We served a variety of handicapped conditions: visually impaired; speech impaired; language impaired; orthopedically impaired; emotionally disturbed; mental retardation. We ran a whole gambit of disorders and handicapped conditions, and also very wide degrees of level of functioning, all the way from very mild to very profound...

The Respondent may choose not to provide educational services for any child past their 18th birthday. Such action must be by formal board policy and must be uniformly applied. It appears from the record that Appellant is entitled to a free appropriate education until his 20th birthday, similar to the services provided to other students in this school district.

The County Superintendent found:

"a free appropriate education for Eddie Alden includes a special education to be given during normal daily school hours, together with related services...in a home or residential setting...
(Conclusions of law.)

The Respondent has not developed an Individual Education Plan (IEP) for Appellant. See T. p. 197. Administrative rules were not followed to provide a change in special education placement. The Child Study Team must be reconvened and a recommendation forthcoming in determining appropriate placement through the Individual Education Plan. See 10.16.903 ARM.

The Montana Supreme Court in B.M. v. State of Montana et al., ___Mont. ___, 649 P.2d 425, 39 St. Rptr. 1285 (1982) has placed the responsibility on school authorities to follow proper procedure in placing a child in special education programs. Such procedures include a Child Study Team review, a development of the Individual Education Program, a recommendation of appropriate placement, and then an opportunity for a hearing if such placement is not believed to be in the least restrictive environment within the school district of Montana.

This case is reversed and remanded to the County Superintendent with instructions to comply with the decision.

DATED November 22, 1982.